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COURT OF APPEALS

STATE OF NEW YORK

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FRED L. PASTERNAK,

Appellant,

-against-

No. 112

LABORATORY CORPORATION  
OF AMERICA HOLDINGS,  
a/k/a LABCORP, CHOICEPOINT, INC.,

Respondent.  
-----

20 Eagle Street  
Albany, New York 12207  
June 1, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar  
2 is number 112, Pasternack v. Laboratory Corporation  
3 of America Holdings.

4 Good afternoon, counsel.

5 MS. ARATO: Good afternoon, Your Honors.  
6 My name is Cynthia Arato, and I represent Dr. Fred  
7 Pasternack. I request three minutes for a rebuttal.

8 CHIEF JUDGE DIFIORE: You may have three  
9 minutes.

10 MS. ARATO: I would like to start with the  
11 first certified question regarding negligence. This  
12 court should find that all drug test administrators  
13 who conduct FAA or DOT mandated tests owe a duty of  
14 care to their drug test subjects, either under the  
15 common law or arising out of the regulations and  
16 guidelines that govern those tests.

17 JUDGE RIVERA: Do we need to change the  
18 first question?

19 MS. ARATO: We believe that the answer is  
20 the same, whether you reformulate the question or  
21 not, but we believe the reformulated question more  
22 properly adheres to how this court and other courts  
23 in New York have examined the question of duty.

24 This court in Landon recognized a common  
25 law duty of care to - - - from drug test

1 administrators to their drug test subjects. It arose  
2 in the context of a probationer. Here we have a  
3 pilot who was the victim of a faulty drug test in  
4 various ways.

5 JUDGE STEIN: But - - - but if we found a  
6 duty just based on the regulations themselves, rather  
7 than under Landon, wouldn't we be setting up a  
8 negligence per se standard for - - - for any  
9 regulatory violations?

10 MS. ARATO: No, you wouldn't because you  
11 would be finding a duty arising out of a regulation  
12 and a - - - and a regulation is evidence of  
13 negligence, but it is not conclusive eg - - -  
14 evidence of negligence per se. If you found a duty  
15 arising from a statute, that would be a different  
16 question, but here we have regulations - - -

17 JUDGE FAHEY: So what you're saying is - -  
18 -

19 MS. ARATO: - - - and guidelines.

20 JUDGE FAHEY: -- what you're saying is we  
21 can't find a duty arising solely out of the  
22 regulation, that there has to be a common law duty  
23 that the regulation then defines.

24 MS. ARATO: No, I'm saying you could do it  
25 either way, we believe, either way, whether you find

1 a duty arising out of the common law with the  
2 regulations and guidelines defining the standard of  
3 care or whether you find the duty arising from the  
4 regulation and guidelines. The answer to both is  
5 that you should find the duty.

6 The difference I'm talking about is that  
7 when you find - - - when you have a statute, whether  
8 the statute defines the standard of care or defines  
9 the duty, a statutory violation is negligence per se.

10 JUDGE FAHEY: Right, it's a little bit  
11 different - - -

12 MS. ARATO: But a regulatory violation is -  
13 - -

14 JUDGE FAHEY: It's different, though, in a  
15 regulatory environment than it is with a statutory  
16 environment, don't you think?

17 MS. ARATO: Correct. It is evidence of  
18 negligence, but it's not conclusive, unreasonable.

19 JUDGE GARCIA: But, counsel, does it make a  
20 difference that this is - - - as I understand it - -  
21 - what the guideli - - - what the rules were for this  
22 part of the process were guidelines, not a  
23 regulation. Is that true?

24 MS. ARATO: There's a combination. We have  
25 regulatory - - - we have alleged regulatory

1 violations and we have violations of guidelines.

2 JUDGE GARCIA: What's the regulatory  
3 violation?

4 MS. ARATO: The - - - for - - - there's two  
5 different defendants here. For LabCorp, which was  
6 the test collector, there's a regulation that governs  
7 what's known as the shy bladder procedure, and  
8 guiding the test subject through what he needs to do.

9 For the - - - ChoicePoint, there are only  
10 regulations at issue and the - - - it is a regulation  
11 that prohibited them from reporting Dr. Pasternack as  
12 a refusal to test, and there's a regulation mandating  
13 that they investigate problem - - - problems for drug  
14 tests.

15 There's also guidelines and the guidelines  
16 relate to LabCorp, and the guidelines are also a  
17 guideline regarding the shy bladder procedure, as  
18 well as a guideline that instructed LabCorp that it  
19 had to tell Dr. Pasternack that if he left the  
20 facility, he would be deemed a refusal to test.

21 JUDGE FAHEY: Now - - - now I understand  
22 the argument of Landon applying to LabCorp, the - - -  
23 the tester, but how - - - how would Landon apply to  
24 ChoicePoint?

25 MS. ARATO: Well, I think, so in the FAA

1 regime and the DOT regime, the drug test starts the  
2 moment the subject walks through the door, and it  
3 continues until the MRO completes its duties, so - -  
4 -

5 JUDGE FAHEY: So you're saying it's all  
6 part of one process then - - -

7 MS. ARATO: It's all part of - - -

8 JUDGE FAHEY: - - - so the duty is the  
9 same.

10 MS. ARATO: Correct. It's all part of one  
11 drug test process, and we believe that just because  
12 you are doing one part of the process and not the  
13 other is not a reason that the - - - you're - - -  
14 you're duty-free.

15 And here, the MRO played a critical role in  
16 the process. They're defined as the gatekeeper. And  
17 their purpose, in part, is to ensure fairness and  
18 protect the drug test subject from unwarranted false  
19 drug reports, drug test reports.

20 JUDGE FAHEY: You want to - - - you want to  
21 get it done - - - talk about reliance?

22 MS. ARATO: Absolutely. So we think this  
23 court should also confirm that a plaintiff who's  
24 harmed by a defendant's deliberate lies may assert a  
25 claim for fraud based on the theory of third-party

1 reliance.

2 JUDGE STEIN: Is - - - is that - - - is  
3 that what the interest of our tort fraud law is - - -  
4 is really about? Or - - - or is it about the  
5 situation where the plaintiff changes his or her acts  
6 based on reliance on something that somebody else  
7 said, whether it came through another person or  
8 directly to that person.

9 MS. ARATO: Right.

10 JUDGE STEIN: It's - - - I mean that - - -  
11 that's what fraud seems to be about to me.

12 MS. ARATO: Well, I think fraud is about  
13 two things, and I think the precedents of this court  
14 show that. It's, one, about causation and reliance  
15 is been recognized as a proxy for causation, and that  
16 purpose is served whether you have first party  
17 reliance or third party reliance. And it's also to  
18 prohibit and discourage dishonesty, and whether you  
19 have reliance by a first party or a third party, that  
20 - - -

21 JUDGE STEIN: But we have other torts. We  
22 have interference with contractual relations. We  
23 have - - - we have defamation. We have all - - - all  
24 kinds of things for false statements. But I - - -

25 MS. ARATO: I - - - I think that if - - -

1 if you left it to those torts, there would still be a  
2 gap, and there would be a gap for victims of  
3 defendants who lie to people in a way that directly  
4 harms the plaintiff. So for example, the tort - - -  
5 tortious interference applies to some of the third  
6 party reliance cases that have been brought, but not  
7 all of them. And the tort of defamation only relates  
8 to a certain type of fraud.

9 JUDGE STEIN: But would - - - wouldn't this  
10 be a very significant expansion of our fraud law?

11 MS. ARATO: I - - - I think it would be  
12 recognizing precedent of this court, and it would not  
13 be an extension - - -

14 JUDGE STEIN: That's in, what, Rice?

15 MS. ARATO: - - - an expansion.

16 Rice and Piper. Both of them, the - - -  
17 this court in very clear language talked about the  
18 policies behind fraud and said in writing - - -

19 JUDGE STEIN: But Rice didn't even talk  
20 about reliance. That wasn't even an element of the  
21 cause of action in Rice.

22 MS. ARATO: It said, "It matters not  
23 whether the false representations be made to the  
24 party injured or to a third party, whose conduct is  
25 thus influenced to produce the injury."

1 JUDGE STEIN: Right, but there is no - - -

2 MS. ARATO: And that means reliance.

3 JUDGE STEIN: - - - there is no reliance  
4 element.

5 MS. ARATO: Well, it - - - there was a rel  
6 - - - reliance, in fact, took place in that case.  
7 The buyer of the cheese relied on the lie to not keep  
8 the cheese for the plaintiff who he was supposed to  
9 sell it to. And the court recognized that that is  
10 exactly what caused the injury to the plaintiff. And  
11 there was reliance in Piper.

12 JUDGE FAHEY: You know, a - - -  
13 analytically, it seems like - - - and - - - and I'm  
14 not sure if the quest - - - the questions brought it  
15 up; it may get added or not; I - - - I'm not sure  
16 about that. Maybe the question should be  
17 reformulated. But it seems that analytically,  
18 there's two forms of reliance here.

19 There's the intent to induce reliance,  
20 which is Senter (ph.), which is, I guess, the third  
21 element of - - - of the fraud tort test. There - - -  
22 and then there's the justifiable reliance of the  
23 parties injured. Usually the plaintiff in this case  
24 is the plaintiff. And that takes a different form.  
25 And you are right that the nineteenth century cases

1 seem to point in that direction, though not with the  
2 clarity perhaps that we'd want, say, from Prosser on  
3 Torts, or something like that.

4 But what I'm wondering is, is when going  
5 through your brief, the most recent reliance case  
6 that spoke of Santor or intent to induce reliance was  
7 the Bynum case in the Third Department. Are you  
8 familiar with that?

9 MS. ARATO: Yes, Your Honor.

10 JUDGE FAHEY: All right, you didn't address  
11 it; I didn't think. Do you want to address it now?

12 MS. ARATO: In terms of what? In terms of  
13 why they thought about reliance or - - -

14 JUDGE FAHEY: Yeah, it seemed - - - it  
15 seemed to me that the case law for - - - for Santor,  
16 an intent to induce reliance, seemed to be pretty  
17 clear that we - - - there are instances where you can  
18 point, just like you say, to a third party to induce  
19 reliance on someone else. And that form of reliance  
20 under the test, third party reliance, is pretty con -  
21 - - is - - - has been held on and has been held.

22 But the cases that talk about justifiable  
23 reliance pretty consistently say that no, that you  
24 cannot rely on a third party. And - - - and that the  
25 failure to draw that distinction may be the source of

1 the lack of clarity here. And - - - so what do you  
2 have here? Do you have an intent to induce reliance  
3 or do you have the plaintiff not justifiably - - - or  
4 justifiably relying on a third party when it can't;  
5 it could only rely on a first party.

6 MS. ARATO: Well, he - - - we have here - -  
7 - we - - - our plaintiff did not rely. The  
8 statements were not made to him. But he was injured  
9 by statements made to a third party who did rely - -  
10 -

11 JUDGE FAHEY: Right, what I'm asking though  
12 is what - - -

13 MS. ARATO: - - - and justifiably - - -

14 JUDGE FAHEY: No, we - - - we know the  
15 facts. What we - - - what I wondered is what part of  
16 the test are you coming under or are you coming under  
17 both parts of the test?

18 MS. ARATO: I - - - I'm - - - we're coming  
19 under both parts, although I think it's the third - -  
20 -

21 JUDGE FAHEY: Explain how.

22 MS. ARATO: It's the - - - the third party  
23 here justifiably relied on the fraudulent statements.  
24 And we think that whether it's a third party that  
25 justifiably relies or the first party that

1           justifiably relies, the principles of fraud and the  
2           need to have fraud not expose defendants to limitless  
3           categories of claims are - - - are both served by  
4           reliance in a third party setting.

5                    JUDGE STEIN:  So the plaintiff's ability to  
6           prevail on a cause of action would depend on what the  
7           other party knew or didn't know - - -

8                    MS. ARATO:  Yeah, it - - - I - - -

9                    JUDGE STEIN:  - - - or should have known.

10                   MS. ARATO:  It would still - - - it would -  
11           - - you would still require a showing that there was  
12           an intent to defraud and that there was reliance and  
13           that there was causation.

14                    JUDGE STEIN:  Well, wait, it has to be  
15           justifiable reliance, right?

16                    MS. ARATO:  Yeah, I - - -

17                    JUDGE STEIN:  That's - - - I think that's  
18           what Judge Fahey's getting at.

19                    JUDGE FAHEY:  Right.

20                    JUDGE STEIN:  So - - - so now we're looking  
21           to what the other person did or didn't do or know  
22           when in - - - in showing that - - -

23                    MS. ARATO:  Right.

24                    JUDGE STEIN:  - - - it was the fraud that  
25           caused - - - or maybe it's a causation - - -

1                   MS. ARATO: I think - - - I think there are  
2                   certainly arguments that in this setting it may not  
3                   be appropriate to require the same form of  
4                   justifiable reliance, since the plaintiff is equally  
5                   harmed. I think that, in this case, there was  
6                   justifiable reliance, and either way, I think the  
7                   third party reliance - - -

8                   JUDGE FAHEY: Well, another way of looking  
9                   at it is there may be third party reliance with an  
10                  intent to induce reliance, because you're inducing  
11                  reliance. If a salesmen is selling me a car, and - -  
12                  - or selling my wife and I into a car. My wife's  
13                  buying the car, and he tells me it'll do such and  
14                  such. It gets sixty miles to a gallon and it only  
15                  gets fifteen. And I tell her it gets sixty miles to  
16                  a gallon.

17                  Is he attempting to induce reliance through  
18                  me, a third party, to her? And - - - and if then - -  
19                  - then - - - then did she justifiably rely upon his  
20                  statement to me that I made to her? Those two forms  
21                  - - - her justifiable reliance has to do with whether  
22                  or not she reasonably would rely on that statement.  
23                  His intent to induce reliance is an attempt to tell  
24                  me something, to get me to perform an act that he  
25                  knew was fraudulent.



1 My name is Frederick Smith, and I represent  
2 LexisNexis Occupational Health Solutions, formerly  
3 know as ChoicePoint.

4 With respect to the certified question that  
5 relates to my client, ChoicePoint, whether the FAA or  
6 DOT regulations and guidelines create a duty of care  
7 for drug testing laboratories and program  
8 administrators under New York negligence law, the  
9 answer is clear. And that answer is no.

10 Under this court's authority and what we  
11 see in the Drake opinions are - - - are several  
12 principles. Number one, to - - - to several of the  
13 justices' points earlier, any argument that a duty is  
14 created based on a DOT-FAA regulation doesn't  
15 properly convert the cause of action into one of  
16 negligence per se, which is not permissible for a  
17 claim that's based - - -

18 JUDGE FAHEY: That's - - - that's not the  
19 way I read the question. The way I read the - - -  
20 the question is, are the regulations relevant in - -  
21 - in - - - in outlining the parameters of the duty in  
22 the same - - - same - - - in - - - we do it all the  
23 time is OSHA regulations, DOT regulations in New  
24 York, BMT regs. All the time the parameters of duty  
25 are defined by administrative regulations. It's

1 pretty common law. The - - - the question is, if  
2 there is - - - first, is there a common law duty that  
3 precedes it. And then from there, what's the  
4 application of the regs.

5 MR. SMITH: And I - - - I - - - I agree  
6 with - - -

7 JUDGE FAHEY: Part of it.

8 MR. SMITH: - - - with part of what you've  
9 said, but I do take issue with the - - - the way that  
10 the question has been framed by the Second Circuit  
11 and it says "create". I think that's a powerful word  
12 that has meaning. Where I think we are in - - -

13 JUDGE FAHEY: You might - - - I - - - I - -  
14 - that's an interesting point. You might be - - -

15 MR. SMITH: Where I think we are in  
16 agreement is that the DOT regulations may in some  
17 instances provide evidence with respect to the scope  
18 of that duty. But the duty must have a basis under  
19 New York common law.

20 JUDGE STEIN: Well, that's the question.

21 MR. SMITH: And - - - and - - - and - - -

22 JUDGE STEIN: Why - - - why - - - why isn't  
23 there a duty here?

24 MR. SMITH: Be - - - because there is  
25 absolutely no basis under New York precedent - - -

1 the decisions of this court that would su - - -

2 JUDGE STEIN: Well, Landon talks about a  
3 duty in this context.

4 MR. SMITH: It talks about a duty, Your  
5 Honor, that relates to drug testing laboratories.

6 JUDGE STEIN: Well, it talks about accuracy  
7 in drug testing.

8 MR. SMITH: That's - - -

9 JUDGE STEIN: The - - - the - - -

10 MR. SMITH: That is correct.

11 JUDGE STEIN: The interests of that. So if  
12 - - - if a - - - a lab misreads the blo - - - the  
13 test and comes up with a false-positive, okay, what  
14 is the - - - the difference in results to the testee  
15 from here saying it was a refusal and therefore it's  
16 a considered a positive.

17 MR. SMITH: Well, I think - - -

18 JUDGE STEIN: What's the difference?

19 MR. SMITH: There - - - there's a big  
20 difference, and particularly when you're premising  
21 the claim based on the DOT regulations. There has to  
22 be a special duty, a very specific duty owed by in -  
23 - - in my client's case, the MRO to the donor. And  
24 if you look at the regulations, it just simply  
25 doesn't exist.

1 Under New York common law, there has to be  
2 a special relationship.

3 JUDGE STEIN: Isn't it though the role of  
4 the MRO, right, is to protect the testee's interest  
5 in having an accurate - - - partly - - - in part, in  
6 having an accurate test result, is it - - - is it  
7 not?

8 MR. SMITH: It's to ensure the accuracy of  
9 the process.

10 JUDGE STEIN: Okay, so that - - -

11 MR. SMITH: And - - -

12 JUDGE STEIN: - - - but that - - - but  
13 that's got a two-fold purpose, you know. One is for  
14 the employer to make sure that the employer is  
15 finding out if there is drug use here, and the other  
16 is to the employee to make sure that he or she is not  
17 falsely reported as failing a test.

18 MR. SMITH: I - - - I disagree with the  
19 latter assertion and I think the responsibilities  
20 that the MROs are to the process and to the public at  
21 large, which was the major public policy reason  
22 behind the enactment of these regulations. Now when  
23 you focus on - - - on what might - - -

24 CHIEF JUDGE DIFIORE: What does that mean  
25 to the process?

1 MR. SMITH: The - - - the testing process,  
2 and we're trying to ensure that - - - that there's  
3 some integrity here to the process - - -

4 CHIEF JUDGE DIFIORE: For whose benefit?

5 MR. SMITH: - - - and yet - - -

6 CHIEF JUDGE DIFIORE: For whose benefit?

7 MR. SMITH: Primarily for the benefit of  
8 the employer which contracts the MRO and for the  
9 public at large who might be harmed by individuals  
10 who are under the influence of controlled substances  
11 or alcohol.

12 JUDGE STEIN: But doesn't Landon negate  
13 that?

14 MR. SMITH: Ne - - - negate what, Your  
15 Honor?

16 JUDGE STEIN: Negate that premise that - -  
17 - that there's - - - that there's - - - that the - -  
18 - the employee is not - - - or in - - - in Landon, of  
19 course, it wasn't an employee, it was - - - it was a  
20 probationer - - - but that there is some connection  
21 to ensuring a fair result to the person being tested.

22 MR. SMITH: The focus on - - - in Landon  
23 and the focus on a long line of cases is on a duty  
24 that a drug-testing laboratory, not a program  
25 administrator, might owe to individuals involved in

1 the process. And - - - and there's not one ment - -  
2 -

3 JUDGE STEIN: But why isn't this a natural  
4 extension of that?

5 MR. SMITH: It's not a natural extension,  
6 to the extent that you're premising it on the DOT  
7 regulations, Your Honor. And there - - - there is  
8 not a clar - - - there's not clarity with respect to  
9 what our client did here. If you look at the  
10 regulations, 40.191, "As an employee, you have  
11 refused to take a drug test if you fail to remain at  
12 the testing site until the testing process is  
13 complete." We merely passed on information that was  
14 provided to us.

15 JUDGE STEIN: Well, there may be no breach  
16 of a duty here. That's perfectly possible, I think.  
17 But that - - - that begs the question why there's - -  
18 -

19 MR. SMITH: Even more important is if you  
20 look at Sub part G, which sets forth the medical  
21 review officer's - - - their responsibilities, what  
22 tasks they perform in this scheme. And amongst other  
23 things, 40.123(d), "While you provide medical review  
24 of employees' test results, this part does not deem  
25 that you have established a doctor-patient

1 relationship with the employee whose tests you  
2 review."

3 Throughout the rest of 40.123, which  
4 discusses in detail the MRO's responsibilities to the  
5 program, to the process, there's not one mention of  
6 any obligation that it, as a service agent - - -

7 JUDGE FAHEY: But that's - - - that's on -  
8 - - that's - - -

9 MR. SMITH: - - - and it performs a limited  
10 role - - -

11 JUDGE FAHEY: It's only relevant, though,  
12 is - - - is if we agree with you, that the source of  
13 the duty, as the way the plaintiff put it, rather  
14 than the - - - that the regulations provide the  
15 source of the duty. If we say the common law  
16 provides the source of the duty, then that's not  
17 really relevant. They just go to whether or not they  
18 measure the standard of which - - - against which the  
19 du - - - activities can be measures, and do you agree  
20 with that?

21 MR. SMITH: And to your po - - - and to - -  
22 - I - - - I do. It - - - it relates to the scope - -  
23 -

24 JUDGE FAHEY: Yeah.

25 MR. SMITH: - - - assuming that there is

1 some duty that has been established - - -

2 JUDGE FAHEY: Well, that's fair - - -

3 that's a fair response. I agree with that. Thank  
4 you.

5 MR. SMITH: And - - - and there's no New  
6 York authority that establishes a duty from an MRO to  
7 a donor, particularly in this context.

8 CHIEF JUDGE DIFIORE: Thank you, Mr. Smith.

9 MR. SMITH: Thank you.

10 CHIEF JUDGE DIFIORE: Rebut - - - oh, I'm  
11 sorry. Excuse me, sorry.

12 MR. STEINER: Good afternoon, Robert  
13 Steiner from Kelley Drye for Laboratory Corporation  
14 of America Holdings, LabCorp.

15 The issue for this court to decide, I  
16 believe, is really whether there is a common law  
17 duty. The federal courts in the Drake case and the  
18 court in the Mohawk Motors case in the Sixth Circuit  
19 have already held that the regulations do not create  
20 a cause of action. And because those regulations do  
21 not create a cause of action, they do not create a  
22 duty of care to individual drug testing subjects. So  
23 what the Second Circuit certified as a question to  
24 this court is whether or not under New York law,  
25 there is a common law duty.

1                   Now this court decided the Davis case late  
2                   last year. It's not in our brief, but it lays out  
3                   very clearly on what basis a common law obligation  
4                   can be imposed and it talks about issues such as  
5                   morality, logic consideration of social con - - -  
6                   social consequence, and who is in the best position  
7                   to prevent the risk of harm that would result. And -  
8                   - -

9                   JUDGE STEIN: Well, how - - - how - - -  
10                  where do you draw a line or a distinction between the  
11                  person that is testing, you know, the blood or the  
12                  urine itself, and the person who is at a different  
13                  point in the process who is responsible for that - -  
14                  - for that - - - I mean, it's a process, right?

15                  MR. STEINER: It is a process.

16                  JUDGE STEIN: It's not - - - it's not  
17                  distinct actions. It's a process.

18                  MR. STEINER: It is a process, and what  
19                  this court held in Landon really was very consistent  
20                  with what other courts had held, which was that a  
21                  drug-testing laboratory, my client, had a - - - a  
22                  duty to report accurate results. So so-called false-  
23                  positives would create a cause of action. Failure to  
24                  maintain a chain of custody - - - excuse me - - -  
25                  would result in a cause of action, and those are

1 basic duties and obligations that are really very  
2 consistent with Davis, because they're rooted in the  
3 common law of what is fair and just and right. In  
4 this - - -

5 JUDGE STEIN: Well, what - - - what if - -  
6 - what if the employee here had - - - if - - - if the  
7 person being tested had not even - - - had not left  
8 the premises, okay. But the employee had falsely  
9 reported or negligently reported, switched two  
10 samples, and negligently reported that this  
11 Pasternack had - - - had left, thereby deeming it to  
12 be a refusal. How is that different from negligence  
13 in the testing resulting in a false-positive?

14 MR. STEINER: Well, a couple - - - a couple  
15 of points on that hypothetical, and - - - and I  
16 really want to make it very clear here, as I think it  
17 is in the record, that the test collector here never  
18 reported a refusal of the test. She reported  
19 accurately what had occurred at the testing - - -

20 JUDGE STEIN: I know, but that's not my - -  
21 -

22 MR. STEINER: - - - at the testing  
23 facility.

24 JUDGE STEIN: I know, but that's not the  
25 hypothetical. The hypothetical is what if she

1 negligently reported that he had left, leading to a  
2 finding of a - - - of a refusal?

3 MR. STEINER: Well, I'm not sure how she  
4 would negligently report that - - - that he - - -  
5 that he had left, but you have - - -

6 JUDGE STEIN: By confusing two people.

7 MR. STEINER: - - - an FAA investigative  
8 process. You have an FAA investigative process. You  
9 have it and that's exactly what happened here. You  
10 have FAA investigators coming out, asking questions  
11 of the collector, asking questions of the plaintiff  
12 in this case. You have an adversarial proceeding.  
13 You have findings of credibility wi - - - in this  
14 case, with the ALJ. The ALJ found that the - - - the  
15 test collector was more credible.

16 Notwithstanding that, what you ha - - -  
17 what you had was the DC Circuit saying, look, what  
18 happened here was very simple. This individual had  
19 permission to leave. And because he had permission  
20 to leave, that is not a refusal to test.

21 So what the plaintiff seeks to do here is  
22 really impose a higher standard of care, a higher  
23 duty on a test collector, an individual who works in  
24 a laboratory, who sees perhaps hundreds of people a  
25 day, to be so well versed in the intricacies of these

1 regulations that in a given circumstance, she is  
2 going to advise a test subject of something that,  
3 frankly, the FAA, who are the experts in this field -  
4 - -

5 JUDGE FAHEY: The prob - - - the prob - - -  
6 the problem with your argument is, is - - - it may be  
7 a good trial argument, but at this point in deciding  
8 whether or not there's a duty here, a common law  
9 duty, it - - - it doesn't seem to really address  
10 that. It - - - it sounds to me almost as if you're  
11 saying that this is really preempted.

12 MR. STEINER: Well, let me - - - let me - -  
13 - let me address that, and I think as - - - as we - -  
14 - when we talk about Davis and we talk about how this  
15 court has established common law obli - - - common  
16 law obligations.

17 JUDGE FAHEY: Let me just explain the  
18 reason I say it, because the codefendant has a  
19 stronger - - - I - - - I think it - - - you both have  
20 a tough argument, but the codefendant has a stronger  
21 argument on - - - on saying the duty doesn't apply to  
22 us, but how after Landon the duty couldn't apply to  
23 LabCorp, I'm having a difficult time seeing, unless  
24 it was preempted in some way.

25 MR. STEINER: Well, I - - - I agree that

1 under Landon, LabCorp has a duty to report accurate  
2 test results. And as I said before, in this court, I  
3 think Your Honor cited, the Drake case, you cite the  
4 Coleman case in support of that. And those cases  
5 stand for a fairly - - - excuse me - - - a - - - you  
6 know, an unremarkable proposition that had already  
7 been adopted in - - - in states and in federal  
8 district courts throughout the country.

9 One of the reasons why there's no common  
10 law duty here is really based on the guidelines and  
11 the regulations themselves. When we talk about  
12 common law standards, we talk about things that are  
13 pretic - - - predictable, that are rooted in  
14 morality, that are rooted in logic.

15 The 2014 guidelines specifically state that  
16 this collector had - - - didn't have the obligation  
17 that this entire case is predicated on. And where  
18 the - - - the guidelines are so changeable, where  
19 they are so vague - - - and frankly, that's what  
20 Judge Gardephe found in the District Court that these  
21 guidelines were - - - were too vague to impose a  
22 duty. These guidelines specifically say there is no  
23 requirement for a collector to inform an employee - -  
24 -

25 JUDGE FAHEY: That's all fine and - - - if



1 MR. STEINER: And I think - - -

2 JUDGE STEIN: You still have causation  
3 issues, though.

4 MR. STEINER: And - - - and there are  
5 certainly very many causation issues here, but I - -  
6 - I think that this case can be resolved really on  
7 the duty issue, and that - - -

8 JUDGE RIVERA: Okay, so what - - - what - -  
9 - what - - - you're interpreting this case, so what  
10 are you interpreting? What do you say is the rules  
11 to the scope of your duty - - - of your client,  
12 sorry?

13 MR. STEINER: I think the scope of the duty  
14 is very simple. It's - - - it's the - - - the duty  
15 to report an accurate test result. We did that - - -

16 JUDGE RIVERA: Yeah, but what - - - what  
17 does that mean, when you say an accurate test result?

18 MR. STEINER: It means that when we say  
19 someone is positive for a metabolite, for marijuana,  
20 or for cocaine, or any substance of abuse, that that  
21 test result, because we are the experts in performing  
22 that specific test, that that test is accurate,  
23 because the MRO and the FAA, they're not in a  
24 position - - -

25 JUDGE RIVERA: So does that mean - - -

1 MR. STEINER: - - - to say - - -

2 JUDGE RIVERA: - - - you can add no other  
3 commentary?

4 MR. STEINER: Pardon me?

5 JUDGE RIVERA: That you can add no other  
6 commentary, is that what that means? You only say,  
7 yes, it's positive; no, it's negative.

8 MR. STEINER: Exactly, because - - -

9 JUDGE RIVERA: That's it. You add no other  
10 commentary.

11 MR. STEINER: Because whatever - - -  
12 exactly. That's exactly what happens, and - - - and  
13 in this case - - -

14 JUDGE RIVERA: And if you add commentary?

15 MR. STEINER: We - - - we didn't add  
16 commentary.

17 JUDGE RIVERA: Well, I - - - I understand.  
18 It's my hypothetical. If you add some commentary,  
19 would that be covered by the scope?

20 MR. STEINER: I think at that point, I  
21 don't believe it would, because what would happen in  
22 that case, and this is how the system is set up, is  
23 that the MRO and then ultimately, the FAA, would  
24 determine based on accurate facts - - - accurately  
25 reported facts - - - what the consequence was, and in

1           this case, the DC Circuit did exactly that. Based on  
2 accurately reported facts, the DC Circuit said that  
3 was permission to leave, and therefore, there is - -  
4 - there is no cause to revoke the airman's  
5 certificate.

6           If I could just switch very briefly - - - I  
7 see my light's on - - - to the fraud issue, which is  
8 the claim against - - - against my client, and again,  
9 as I said before, there's no dispute that the  
10 statements that were - - - they were not made to Dr.  
11 Pasternack. The statements were made as part of an  
12 investigatory process.

13           JUDGE FAHEY: No, we - - - we understand  
14 that. Let's - - - Montalvo's statements. We got it,  
15 yeah.

16           MR. STEINER: And - - - and they were made  
17 as part of an investigatory process and what - - -  
18 what the plaintiff seeks to do is create a cause of  
19 action based on those statements. And I agree - - -

20           JUDGE FAHEY: You're kind of in an odd  
21 position, though, you - - - we're not - - - I don't  
22 know too much about - - - I won't comment on the  
23 viability of the fraud claim, but what we're being  
24 asked is whether or not third party - - - a reliance  
25 is a viable doctrine in New York, and that's a little

1 bit different, and it may be a viable doctrine under  
2 one of the two types of reliance that we have. That  
3 doesn't mean this is a particularly good claim for  
4 it.

5 MR. STEINER: Well, but I think - - - I  
6 think the fraud standards have been fairly well  
7 established, although, you know, there is some - - -  
8 some prior ambiguity.

9 JUDGE FAHEY: What I'm saying is, that this  
10 isn't the place where we should be trying to knock it  
11 out. The Second Circuit is - - -

12 MR. STEINER: I - - - I - - -

13 JUDGE FAHEY: - - - where you should be  
14 trying to knock it out.

15 MR. STEINER: I disagree with that, because  
16 - - -

17 JUDGE FAHEY: Okay.

18 MR. STEINER: - - - because where you have  
19 third party reliance, you still have statements that  
20 are designed to reach and influence the plaintiff.  
21 And in this particular case, the statements were not  
22 designed to reach and influence the plaintiff.

23 I would also point out as a matter of  
24 public policy, and to address a prior question, that  
25 the plaintiff is not left without a remedy. The

1 plaintiff, if he chooses to do so, could have  
2 asserted perhaps a defamation claim and that  
3 defamation claim would have come with it the defenses  
4 that defamation provides. And in - - - in this case,  
5 that's particularly significant.

6 JUDGE FAHEY: Well, that - - - that was the  
7 dissent, I thought, by Judge Smith in the - - - in  
8 the Landon case, wasn't it?

9 JUDGE ABDUS-SALAAM: Yes.

10 MR. STEINER: I believe - - - I believe it  
11 was, but that's a different issue. I think that's a  
12 different issue than the fraud issue, because in a -  
13 - - in - - - if you're going to impose defama - - -  
14 I'm sorry - - - a cause of action for fraud on, in  
15 this case, a collector, because there's nothing that  
16 would preclude them from suing the collector for  
17 fraud, the collect - - - assuming you found that  
18 cause of action, then really I think what you're  
19 doing you're stifling that investigatory process that  
20 the - - - the investigators come out, they interview  
21 the - - - the witness. The witness may have a  
22 different version of events than the plaintiff, and  
23 in this case, that witness was believed, but that  
24 doesn't create a cause of action for fraud. And in  
25 fact, if you impose that obligation, I think what you

1 do is you - - - you stifle that investigatory  
2 process.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. STEINER: Thank you.

5 CHIEF JUDGE DIFIORE: Counsel, what about  
6 Judge Gardephe's view on vagueness?

7 MS. ARATO: He was referring to only one of  
8 the regulations at issue here, and it's one related  
9 to ChoicePoint and not to LabCorp, and it was the  
10 regulation about the duty to investigate. So it - -  
11 - it was not across the board, and we - - - this  
12 court has upheld statutes that impose obligations  
13 like investigation obligations and have not found  
14 them to be too vague.

15 In terms of the question of stifling  
16 investigations, I don't see how allowing a plaintiff  
17 to sue Montalvo for defamation is allowed but a fraud  
18 claim somehow stifles the investigation. The - - -

19 JUDGE ABDUS-SALAAM: Well, aren't you - - -  
20 aren't you saying basically, counsel, though, that  
21 the injury is the reason, not that there was any  
22 reliance by the plaintiff, or anything else related  
23 to the plaintiff. It's just that the plaintiff has  
24 been injured by these alleged misstatements or  
25 fraudulent statements. And is that enough? Is

1 injury enough?

2 MS. ARATO: I think it is injury and  
3 reliance. We're not trying to dispense of reliance,  
4 but it is a - - - a special species of reliance  
5 that's third party.

6 JUDGE ABDUS-SALAAM: But the plaintiff is -  
7 - - do you agree the plaintiff is not relying?

8 MS. ARATO: We agree the plaintiff is not  
9 relying - - -

10 JUDGE ABDUS-SALAAM: He's the third party,  
11 and so - - -

12 MS. ARATO: Correct.

13 JUDGE ABDUS-SALAAM: - - - the only  
14 connection to the plaintiff is injury.

15 MS. ARATO: It is - - - but he's a  
16 reasonably foreseeable victim. I mean, he's really  
17 the only victim, so it is - - - it is - - - it's - -  
18 - the causation is there. I mean, he is the only  
19 person that could have been injured by this lie, and  
20 he ended up being injured by the lie. And so it is  
21 somewhat different than indirect reliance. It is  
22 actually third party reliance.

23 And I just did - - - wanted to make one  
24 comment about the bi - - - Bynum - - - Byrnum case.  
25 That case was really an indirect reliance case. It

1 was about a - - - a false statement to a  
2 municipality, about the size of a concert event and a  
3 woman's daughter went to the event and she ingested  
4 drugs. And the mother tried to sue on a reliance  
5 there and - - -

6 JUDGE FAHEY: I - - - I viewed it as an  
7 intent - - - there was a - - - impossible as an  
8 intent to induce reliance by the plaintiff on any  
9 statements there, because - - -

10 MS. ARATO: Right, and I think the court  
11 there said that the reason there was no fraud is  
12 because the statement wasn't intended to be  
13 communicated to the mother, and - - - or - - - and  
14 that's really an indirect reliance theory, which is  
15 already trying to get the statement to the plaintiff  
16 or the plaintiff to rely on, and we think the Piper  
17 case and the Rice case and the hog case that the Rice  
18 case relies on - - - there's a lot of food involved -  
19 - - all of those are classic third party reliance  
20 cases and the victim of the lie was injured.

21 Dr. Pasternack here lost his pilot's  
22 license. It took him five years to get it restored.  
23 He lost his ability to fly as a professional pilot  
24 and he lost his ability to earn income as an AME  
25 examiner, and all - - - for all of those reasons, we

1           - - - and that's - - - he was a reasonably and  
2           directly foreseeable victim of the lie that got him  
3           to that point. Thank you.

4                         CHIEF JUDGE DIFIORE: Thank you, counsel.

5                         (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Pasternack v. Laboratory Corporation of America Holdings, No. 112, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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